No. 21,882

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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FALCON PLASTICS—DIVISION OF B-D LABORATORIES, INC.,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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On Petition to Set Aside Decision and Order of
The National Labor Relations Board.

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## PETITIONER'S REPLY BRIEF.

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SHEPPARD, MULLIN, RICHTER & HAMPTON,
FRANK SIMPSON,

458 South Spring Street,
Los Angeles, Calif. 90013,

*Attorneys for Petitioner.*



Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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## PETITIONER'S REPLY BRIEF.

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### 1. The Board's Brief Further Emphasizes That the Board's Reversal of the Trial Examiner Was Not Supported by Substantial Evidence.

The Board, in its Brief, makes no effort to support many of the wrong grounds upon which it relied in its Decision and Order for its reversal of the Trial Examiner, but instead now advances new, but equally wrong, grounds:

a. In the Decision and Order, the Board claimed that there was evidence that Petitioner's employees commonly, in their "work-a-day" associations, told the Company to shove it up their butt or stick it up their ass. [R. 66, 68.] There is

no such evidence, as pointed out in Petitioner's Opening Brief, pp. 8, 10.

The Board does not even make a pretense in its Brief of supporting its original wrong assertion on this point.

b. The Board, having abandoned its original wrong assertion that the employees commonly used such language, now turns the other way and equally wrongly claims that the discharge of Reese must have been discriminatory because there is no showing that other employees had ever been discharged for using similar language. (Bd.'s Br. p. 12.)

Since there is no evidence that any other employee ever engaged in such conduct, the fact that the Company did not previously discharge other employees for something which never happened, certainly provides no basis for a finding that when Reese engaged in such conduct, this was not the real reason for his discharge.

c. In the Decision and Order, the Board gave as one reason for its reversal of the Trial Examiner Petitioner's failure to take exceptions to the Trial Examiner's 100% decision in favor of Petitioner. [R. 65-66.] This was fallacious reasoning by the Board and, in any event, it is not "evidence" justifying reversal of the Trial Examiner. (Pet. Op. Br. p. 11.) The Board's Brief makes no attempt to justify its original wrong contention on this point.

d. In the Decision and Order, the Board wrongly sets forth that Petitioner offered no reason for

imposing the harshest penalty on Reese. [R. 67, 68; Pet. Op. Br. p. 10.]

The Board now concedes that Petitioner in fact gave its explanation for discharging Reese and, instead of (as originally) completely denying the existence of this explanation, the Board now takes the new position that the explanation should be rejected merely because the Board disagrees with it. (Bd.'s Br. p. 13.)

e. The Board, in its Brief, says "Moreover, Reese was considered a good employee during his entire tenure" (Bd.'s Br. p. 12), citing R. 32, R. 67 and T. 454. This is another instance of the Board's going beyond the record, and simply is not true.

The true fact is that in early 1966, a few months before Reese's discharge, his work was defective and careless, and he was warned for this. [R. 30:20-33:13.] As the Trial Examiner found [R. 33:1-13] and as adopted by the Board [R. 64], the "overwhelming" evidence "abundantly" establishes that the warning was justified. Also, as noted on the Merit Rating Form in connection with the very wage increase which triggered Reese's insubordination, "He has improved in a lot of ways. Very good performance, *but he needs to improve in his attitude.*" [R. 34:17-59; Resp. Ex. 10; emphasis added.]

The Board says that at the time of his discharge, Reese was being considered for a supervisory position (Bd.'s Br. p. 12), but the only source cited by the Board for this proposition is Reese's own testimony [R. 35:57-60; T. 89:1-8],

which, by-and-large, was repeatedly and sharply discredited by the Trial Examiner. [R. 24:45; 26:10-14; 26:26-31.]

The Board says Reese had made some "money-saving suggestions" to the Company. (Bd.'s Br. p. 12.) This is a deceptive inaccuracy. What the record actually shows is that he had made some "constructive" suggestions almost three years before his discharge. [R. 32:43-47; R. 67; T. 456: 16-458:3.]

f. The Board says that the Company's discharge of Reese "while retaining the two other employees who acted in a similar manner" provides "ample basis" for the Board's finding that Reese was discharged for an unlawful discriminatory reason. (Bd.'s Br. p. 15.)

It provides no such thing, and we respectfully trust that the day will never come when it can be said that when three employees are engaged in protected concerted activity and one of them is discharged, *failure* to discharge the others supplies substantial evidence that the discharge of the one was in fact caused by the concerted activity of the three. This is a total *non sequitur,* and such a theory, in effect, says that the commission of one unlawful act is proved by evidence of the non-commission of two others. The Board's heavy reliance on such nonsense underscores the insubstantial basis on which the Board reversed the Trial Examiner.

g. In any event, in urging that the three employees "acted in a similar manner" (Bd.'s Br. p. 15), the Board again manufactures facts. The

three employees did *not* "act in a similar manner," and that is the whole crux of this case. Neither of the other two employees told the Company to shove it up their butt or stick it up their ass, and it is completely misleading for the Board to argue that they acted "in a similar manner."

The Board, in seeking to justify its reversal of the Trial Examiner, has, in both its Decision and its Brief, misstated the evidence, has created circumstances that have no basis in the realities of this case, and has relied upon strange concepts of how lack of evidence (rather than substantial evidence) proves that Petitioner acted unlawfully. In so doing, the Board has improperly reversed the Trial Examiner's findings of fact.

### 2. The Board Improperly Reversed the Trial Examiner's Findings of Fact.

The Board asserts that "in reversing the Trial Examiner, the Board did not disturb his findings of fact or credibility findings, but merely drew different conclusions from those findings. Under such circumstances, the Trial Examiner's contrary conclusions are not entitled to special weight." (Bd.'s Br. fn. 8, p. 7.)

This is a wrong statement.

Petitioner's motivation, intent or reason for discharging Reese is a question of fact. (*NLRB v. Stafford,* 206 F. 2d 19, 22, 23 (8 Cir. 1953).) A man's motive, like his intent, is as much a fact as the state of his digestion. (*NLRB v. Park Edge Sheridan Meats, Inc.,* 341 F. 2d 725, 728 (2 Cir. 1965).) Accordingly, when the Board reversed the Trial Examiner, the Board

*did* disturb his findings of fact and credibility findings.[1]

Implicit in the Board's reversal of the Trial Examiner is a categorical rejection of the unanimous sworn testimony of management that they considered Reese to be insubordinate and that that was the sole reason for his discharge. [T. 292:23-293:21; 295:6-12; 384:11-14; 450:24-451:3; 481:1-4; 502:22-506:2; 548:8-549:15.]

It may be true that the Board is not "bound"[2] by this unanimous sworn testimony (Bd.'s Br., fn. 10, p. 9), but when (as here) the testimony is consistent with the findings of the Trial Examiner, both the testimony and the findings of the Trial Examiner are entitled to particular significance (*Universal Camera Corp. v. NLRB,* 340 U.S. 474, 493-497 (1950)), and the Board may not (as it did here) reverse the Trial Examiner for trivial, insubstantial or fabricated reasons. (*Lozano Enterprises v. NLRB,* 357 F. 2d 500, 502 (9 Cir. 1966); *NLRB v. Park Edge Sheridian Meats, Inc., supra,* 341 F. 2d at 728-729 (2 Cir. 1965); *NLRB v. Stafford, supra,* 206 F. 2d at 23.)

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[1]It should be noted that despite the Board's claim in its footnote 8 that it did not "disturb" the Trial Examiner's findings of fact, on the same page of its brief the Board says "the Board *found,* contrary to the Trial Examiner, . . ." (Bd.'s Br. p. 7.)

[2]Contrary to the Board's assertion in its footnote 10, Petitioner never has claimed that the Board is "bound" by such unanimous sworn testimony, but only that such testimony cannot be disregarded as blithely as the Board has disregarded it in this case. (Pet. Op. Br. p. 12.)

### 3. The Cases Cited by the Board Are Distinguishable.

The Board relies on *Butcher Boy Refrigerator Door Company, Inc.*, 127 NLRB 1360, 46 LRRM 1192 (1960), enf'd 290 F. 2d 22 (7 Cir. 1961). (Bd.'s Br. pp. 9, 10.) However, in its decision in that case, the Seventh Circuit expressly distinguished the *Butcher Boy* situation from the situation in the Seventh Circuit's decision in *Miller Electric Mfg. Co. v. NLRB*, 265 F. 2d 225 (7 Cir. 1959) on the ground that in the former, there was evidence of anti-union animus on the part of the employer. (290 F. 2d at 23.) In the present case, the Trial Examiner expressly found that there was no manifestation by Petitioner of opposition to the union or to the self-organizational rights of the employees [R. 29:45-47], no anti-union animus, hostility, or other misconduct on the part of Petitioner [R. 29: 53-30:3], and "there is a total absence of evidence of anti-union animus, hostility or opposition to the Union, or of the commission of unfair labor practices by Respondent [Petitioner]" [R. 40:33-35]. These findings (with the single exception of Reese's discharge) were adopted by the Board. [R. 64.]

Under the circumstances, the Seventh Circuit's *Miller Electric* decision is far more pertinent to the present case than is its *Butcher Boy* decision; as the court said in *Miller Electric* (265 F. 2d at 226):

> "The burden was on the Board to prove that Buchberger was discriminatorily discharged . . . [Citations.] . . . '[W]hen viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view', we cannot conscientiously find that the evidence

> supporting the decision even remotely approaches substantiality. . . . [Citation.] . . . There must be a limit to the amount of strain the Board can place upon threadbare testimony. Here the evidence, when considered in its entirety as we are bound to do, clearly preponderates in favor of Buchberger's lawful discharge. He was subject to discharge for legal cause and the fact that he was engaged in union activity was a coincidence which did not render the just cause invalid."

*Aeronca Mfg. Co. v. NLRB,* 385 F. 2d 724 (9 Cir. 1967), cited and relied upon by the Board (Bd.'s Br. p. 13), is not in point. In that case, there was "acidulous and acrimonious" anti-union animus on the part of the employer (385 F. 2d at 728), a situation not present in the present case. Also, in *Aeronca* none of the supervisors talked to the employee prior to his discharge nor was an investigation of any sort conducted to determine whether the accusation against the employee was accurate. (385 F. 2d at 728.) In the present case, a full investigation was conducted and Reese admitted the accusation. [R. 35:16-36:26.]

### 4. Conclusion.

It is well-settled that engaging in activity protected by the Act does not shield an employee from discharge for cause. (See, *e.g., Miller Electric Mfg. Co. v. NLRB,* 265 F. 2d 225, 226 (7 Cir. 1959).) Here, the Trial Examiner expressly found that Reese's conduct "undoubtedly provided cause for discharge" [R. 38:40-42] and that Petitioner was not unlawfully motivated in discharging Reese. [R. 41:5-28.]

It is undisputed that Reese told the Company to "shove it up their butt'" or "stick it up their ass." The fact that Reese may have been engaged in concerted activity did not prevent his discharge. His insubordination was wholly unnecessary to carry on his legitimate concerted activity, and therefore was indefensible and unprotected by §7 of the Act. *(NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 17 (1962); *NLRB v. International Brotherhood of Electrical Workers,* 346 U.S. 464, 477 (1953).)

Here, the Board, based on contrived, untrue, and demonstrably wrong facts, on insubstantial and patently misleading statements of the evidence, and on illogical concepts has (improperly) substituted its judgment for that of management and has (improperly) reversed the fact-finder's findings of fact. This, the Board cannot do. (*NLRB v. Sebastopol Apple Growers Union,* 269 F. 2d 705, 711 (9 Cir. 1959).)

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON,
FRANK SIMPSON,
*Attorneys for Petitioner.*

## Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK SIMPSON